SUSU LEMBU ASLI MARKETING SDN BHD

v.

DUTCH LADY MILK INDUSTRIES BHD

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-22-190-2002]
6 APRIL 2004

CIVIL PROCEDURE: *Res judicata - Estoppel by record - Judge decided to stay plaintiff's action in fraud against defendant and have dispute referred to arbitration - Whether matter res judicata - Whether plaintiff can still oppose defendant's subsequent application to appoint arbitrator on ground that dispute should be tried in open court*

ARBITRATION: *Arbitrator - Appointment - Application under s. 12 Arbitration Act 1952 - Judge previously decided to stay plaintiff's action in fraud against defendant and have dispute referred to arbitration - Whether matter res judicata - Whether plaintiff can still oppose defendant's subsequent application to appoint arbitrator on ground that dispute should be tried in open court*

This was an application (interlocutory) by the defendant to appoint one Dato' KC Vohrah as a single arbitrator pursuant to s. 12 of the Arbitration Act 1952 ('the Act'). The proposed appointment, however, was objected to by the plaintiff on the ground that the matter should not even have been referred to arbitration in the first place (s. 25 of the Act).

The facts that led to the instant application were that the parties had earlier entered into an agreement by which the defendant was to manufacture and pack various dairy products for the plaintiff. Differences subsequently arose between the parties and the defendant demanded payment from the plaintiff for the dairy products supplied. The plaintiff responded by issuing a notice to rescind the agreement on account of fraud and/or misrepresentation on the part of the defendant, or, alternatively, to terminate the agreement on account of breach of contract by the defendant. The defendant refused to acquiesce to the purported rescission and/or termination of the agreement and the plaintiff commenced an action based on fraud against the defendant. After entering appearance, the defendant filed an application to stay the proceedings pending its move to refer the dispute to arbitration. The plaintiff objected to the stay

application, contending that the matter ought not to be referred to arbitration but should be litigated in the High Court as it involved a serious allegation of fraud. After a hearing, the learned judge allowed the defendant's application and stayed the plaintiff's action, holding that: (i) the defendant had satisfied the requirements of s. 6 of the Act; and (ii) the fact that the party alleging fraud opposes an application for a stay (under s. 6 of the Act) is not in itself a sufficient reason to refuse the application.

Held (allowing the defendant's application):

[1] The issues concerning the question of fraud as raised by the plaintiff as well as the jurisdiction of the High Court had been fully argued before learned judge who heard and allowed the defendant's application for a stay of the plaintiff's civil action. The matter was *res judicata*, and the plaintiff should not have raised it again in the defendant's instant application. "Indeed, litigation would have little point if the losing party, without appealing, or after exhausting appeals, were free to ignore the judgment and return to the courts again." (pp 300 h, 302 b, d-e, 303 a, d-h & 304 a-e)

[Order in terms of defendant's application; costs in the cause.]

Case(s) referred to:

Lai Siew Wah Sdn Bhd v. Ng Chin [1988] 1 MLJ 393 ***(refd)***

Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu [2000] 3 CLJ 666 CA ***(foll)***

Legislation referred to:

Arbitration Act 1952, ss. 6, 12, 25(2)

For the plaintiff - Tan Hock Chuan (MO Lai & Joan Chong); M/s Tan Hock Chuan & Co

For the defendant - CW Teo (YB Tan); M/s Khaw & Partners

Reported by Gan Peng Chiang

JUDGMENT

Hishamudin Yunus J:

The summons in chambers at encl. 40 dated 10 July 2003 is the defendant's interlocutory application to appoint Dato' Karam Chand Vohrah ("Dato' KC Vohrah"), a retired Court of Appeal Judge, as a single arbitrator pursuant to s. 12 of the Arbitration Act 1952 ("the Act").

Section 12 of the Act provides:

Power of High Court in certain cases to appoint an arbitrator or umpire.

12. In any of the following cases:

(a) where an arbitration agreement provides that reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

…

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to appoint or, as the case may be, concur in appointing, an arbitrator, umpire or third arbitrator, and if the appointment is not made within twenty-one clear days after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, umpire or third arbitrator, who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

The plaintiff objects to this application.

Before going into the merits, I shall first touch briefly on the background that led to this application.

On 10 October 2000 the plaintiff and the defendant entered into an agreement under which the defendant agreed to manufacture, pack and supply for the plaintiff various dairy products; and in return for these services the plaintiff agreed to pay the defendant at the rates agreed between the two parties. However, later, in the carrying out of the agreement, differences arose between the parties. In January 2002 the defendant issued a demand letter to the plaintiff asking for payment for products supplied and delivered to the plaintiff.

The plaintiff, in turn, responded by issuing in February a notice to the defendant purporting:

(1) to rescind the agreement on the ground that the plaintiff's consent thereto was vitiated by fraud and/or misrepresentation on the part of the defendant; or

(2) alternatively, to terminate the production agreement on account of breach of the term thereof.

In the same month the defendant replied in writing disputing the plaintiff's right to rescind or terminate the agreement or to claim damages from the defendant, and reminding the plaintiff that the agreement was still in force.

In February 2002 the plaintiff filed a writ of summons and statement of claim against the defendant. Particulars of the plaintiff's claim of fraud against the defendant are pleaded therein.

After entering appearance, the defendant, by summons in chambers *vide* encl. 14A, filed an application for a stay of proceedings pending reference made to arbitration. The defendant's application to refer to arbitration is based on cl. 13 of the agreement. This clause stipulates:

> **13. ARBITRATION**
>
> Any dispute or difference which may arise between the PARITES at any time hereafter whether during the continuance in force of this Agreement or upon its termination, touching any matter or thing therein contained or the operation or construction of this Agreement or any matter or thing in any way connected with, arising from or in relation to this Agreement or the rights, duties, liabilities of the PARTIES hereunder shall be finally settled by arbitration in accordance with the Arbitration Act 1952 (Revised 1972).

The Arbitration Act provides for a party to apply for a stay of proceedings where there is submission to arbitration. Section 6 of the Act states:

> 6. If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

That application (encl. 14A) was objected to by the plaintiff. One of the issues raised by the plaintiff before the learned judge at the hearing of encl. 14A was whether, in the light of the allegation of fraud by the plaintiff in the statement of claim, the matter should be litigated before the High Court instead of referring it to arbitration.

Azmel J heard encl. 14A and granted the defendant's application. On the issue as to whether the matter should instead be heard before the High Court by reason of the plaintiff's allegation of fraud, the learned judge ruled as follows:

> It has been a well established principle that in order to succeed under s. 6 of the said Act the applicant must satisfy 4 requirements, namely:
>
> (1) that the legal proceedings have been commenced against the applicant in respect of a matter which has been agreed should be referred to arbitration;
>
> (2) that no other steps in the proceedings be taken by the Applicant before the making of the application for stay;
>
> (3) that there is no sufficient reason why the matter ought not to be referred to arbitration as agreed between the parties; and
>
> (4) that the Applicant was at the time of the application, remains ready and able to do all things necessary for the proper conduct of the arbitration.
>
> In respect of the 1st requirement I was quite satisfied that the Defendant had shown that the production agreement which became the subject matter of dispute between the Plaintiff and the Defendant contained an arbitration clause as provided by Clause 13 (referred to above). I was also satisfied that this legal proceedings were commenced by the Plaintiff by filing the Writ of Summons against the Defendant on 26th February 2002 in this Court.
>
> In respect of the 2nd requirement it was an undisputed fact that in this Court proceedings all that the Defendant had done was only entering of its appearance. The Defendant had not even filed the Statement of Defence. In the light of such facts I ruled that the Defendant had not taken any steps in the proceedings yet.
>
> It was in respect of the 3rd requirement that the plaintiff strenuously argued that it had more than sufficient reasons why the matter should not be referred to arbitration. The plaintiff had given the following grounds in opposing the defendant's application for a stay of the proceedings:
>
> 1. …[not relevant]
>
> 2. …
>
> 3. …
>
> 4. …

5. that the Plaintiff has a *bona fide* allegation of fraud against the Defendant and hence a reference to arbitration would not be appropriate in accordance with S.25 of the Arbitration Act 9152; and

6. …

…

As to its 5th Ground, the Plaintiff contended that there existed an issue of fraud against the Defendant and hence a reference to arbitration would not be appropriate. However the various authorities referred by the Defendant do not appear to support the Plaintiff's contention.

In *Radford v. Hair & Anor* [1971] 2 All ER 1089 where the Plaintiff opposed the Defendant's application for a stay of proceedings on the ground that the Defendant had made various allegations impugning the Plaintiff's professional reputation. The Court held that because the allegations were akin to allegations of fraud against the Plaintiff and against such allegations, the Plaintiff was entitled to have his case tried by a judge in open court.

In the case of *Cunningham-Reid and Anor v. Buchanan-Jardine* [1988] All ER 438, the English Court of Appeal made the following principles:

1. Where a party accused of fraud opposed a stay of proceedings, the court would almost invariably refuse a stay; and

2. Where the party alleging fraud opposed a stay and the party accused of fraud wished to proceed to arbitration, the allegation of fraud was not by itself sufficient reason for the court to refuse a stay. Instead the Court had discretion dependent on all the circumstances of the case.

In the same case Bingham LJ said:

> The fact that an apparently strong case exists is a consideration relevant to the exercise of the Court's discretion but one that can only be entertained with full recognition that the case has not been tried and that the Defendant's contentions have not been disclosed, let alone investigated … there is no rule that it is appropriate to retain a case in the High Court because a charge of fraud is made against a professional or quasi-professional whether that person does not wish trial in open Court … The Defendant here wants to arbitrate and is entitled by virtue of the agreement to arbitrate unless good reasons exist against the course. In my judgment there is no such good reason and the judge gave quite insufficient weight to the arbitration agreement, which is, in the language sometimes used by continental lawyers, the law between the parties.

> On this issue, it was my finding that the Plaintiff had failed to give any good reasons as to why the disputes should not be referred to arbitration. On the other hand the Defendant had shown concern of likelihood of negative publicity that may befallen to the Defendant with the likelihood of causing irreparable damage to the Defendant's commercial reputation if the disputes were to be heard in the open court. I therefore decided to exercise my discretion in favour of the Defendant.

Having succeeded in its application, the defendant thereafter, on 26 November 2002, gave notice to the plaintiff proposing the appointment of Dato' KC Vohrah as arbitrator. The plaintiff, however, did not concur to the proposed appointment.

Hence, the defendant invokes s. 12 of the Act and *vide* encl. 40 makes the present application.

In his written submission, the learned counsel for the plaintiff states that, in principle, the plaintiff has no objection to Dato' KC Vohrah being appointed as the arbitrator. The learned counsel, however, asserts that the plaintiff, nevertheless, opposed the application. And the objection of the plaintiff to the application, as the learned counsel for the plaintiff puts it, is on the ground that the matter should not in the first place be referred to arbitration. The plaintiff's argument is that, as its claim is premised upon fraud, the matter should instead be adjudicated before the High Court. The plaintiff relies on s. 25(2) of the Act. This provision states:

> (2) Where an agreement between any parties provides that disputes which may arise in the future between them should be referred to arbitration, and **a dispute which so arises involves the question whether any such party has been guilty of fraud,** the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that **the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator** or umpire appointed by or by virtue of the agreement. (emphasis added)

And the learned counsel for the plaintiff refers to the Supreme Court case of *Lai Siew Wah Sdn Bhd v. Ng Chin* [1988] 1 MLJ 393. In this case cited, Wan Suleiman SCJ held (at p. 394):

> Once the Court is satisfied that there is a *bona fide* allegation of fraud against the appellants, then the discretion given to the judge under section 25(3) of the Arbitration Act 1952 was indeed properly exercised.

I have rejected the plaintiff's argument and allowed the defendant's application.

In my judgment, as the issue regarding fraud and the jurisdiction of the High Court had already been fully argued before, and adjudicated by, Azmel J in the defendant's application for stay *vide* encl. 14A (and I have purposely quoted the judgment of the learned judge extensively), the issue is now res judicata and should not have been raised by the plaintiff in the present application. The parties are bound by the decision of the learned judge. In this regard, I only need to remind the plaintiff of the following dictum of Gopal Sri Ram JCA in the Court of Appeal case of *Yee Seng Plantations Sdn Bhd v. Kerajaan Negeri Terengganu* [2002] 3 CLJ 666 (at p. 677):

> Further, it is equally clear from well-established authority that a State Government is bound by the doctrine of *res judicata*. In this context it is sufficient to quote from the second edition of Professor Hogg's work *Liability of the Crown* at p 191:
>
> > The doctrine of r*es judicata* is sometimes treated as a kind of estoppel, namely, estoppel by record. The doctrine stipulates that a judicial decision (unless reversed on appeal) is binding on the parties to the litigation, so that the same issue may not be re-litigated by the parties: once decided by a court of competent jurisdiction, the issue is said to be *res judicata*. The doctrine is obviously required in order to bring disputes to an end. Indeed, litigation would have little point if the losing party, without appealing, or after exhausting appeals, were free to ignore the judgment and return to the courts again.

[Order in terms; costs in the cause]